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No. 01-0215

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARION DIXON, *ET AL.*,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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ARGUMENT OF REPLY

Respondents American National Insurance Co., Chrysler Financial Corp., and Nissan Motor Acceptance Corp. restate Petitioners' issues, seeking to argue through that restatement that a conflict between the circuits is *not* presented by Petitioners' brief and the questions raised in it are *not* before the Court. As such, they make two broad arguments. Taken together, or singularly, the arguments do not undermine the force of Petitioners' Petition, which ought to be granted to resolve significant, reoccurring, and conflicting issues among the circuits on "scheme to defraud" and "proximate cause" in the application of an important federal statute.

I. A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS EXIST

Respondents first seek to restate the facts of the Petition by characterizing them as a "garden variety" fraud, which is not properly cast as a RICO.

That argument, which misstates the facts, belongs, if anywhere, before Congress. In fact, Congress "federalized" properly plead RICO frauds, even though defendants like to call them "garden variety," as if that catch phrase were any more self-defining than "organized crime." RICO applies to "any person" who "violates" its text, however others might label him or her or his or her conduct for rhetorical purposes. 18 U.S.C. §§ 1961 *et seq.* In brief, absent constitutional matters, which are not present here, that legally ends the matter. *Turkette*, 452 U.S. at 587.

Respondents next seek to restate the issues raised by Petitioners to limit them to a single question, "detrimental reliance." Respondents ignore the record before the lower courts, and, ironically, argue that the Petition improperly "characterizes" precedent, while they misstate the scope of the relevant precedent themselves in their own arguments. Only as so restated, and so misstated, by the Respondents do the square conflicts between the circuits, even arguably, fade away.

As Petitioners' brief shows, and Respondents conveniently ignore, "scheme to defraud," under RICO, encompasses, unquestionably, a wide variety of illegal conduct, including (1) face-to-face, misrepresentation frauds, *but not limited to*, face-to-face misrepresentation frauds; the phrase also includes, at least, (2) material omissions, (3) bribery, (4) forms of theft (embezzlement, etc.), (5) breaches of fiduciary responsibility (insider trading by broker-dealers, etc.), (6) tax frauds (failure to pay different kinds of taxes, etc.), (7) bid rigging, (8) check kiting, and (9) a variety of other forms of cheating. Indeed, this Court only excludes from "scheme to defraud" violence. *Fasulo*, 272 U.S. at 628.

Moreover, these various forms of "schemes to defraud" do not *all* involve misrepresentations and may – *or may not* – involve face-to-face transactions; they may also, most significantly, and as Respondents conveniently ignore, involve a variety of forms of fraudulent conduct and take place in complex multiparty schemes.[1] In short,

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[1] They are not even limited to "schemes to defraud" that seek to obtain "property"; they include such schemes that seek

Respondents would like this Court to focus solely on face-to-face misrepresentation fraud, where detrimental reliance may be the general rule, to the exclusion of all other forms of "scheme to defraud." Respondents would like this Court to ignore, and exclude liability for, *omission* fraud – the basis of Petitioners' claim – where a *universal* requirement of detrimental reliance is simply unintelligible (How can one rely on what does not exist, what has been omitted?), or as the Respondents observe, "would make no sense" (Brief in Opposition at p.12), and is not required by the circuits, as Petitioners' brief correctly summarizes the law.

Respondents are engaged in the oldest trick of the magician: they seek to focus the attention of the Court on one facet of a multifaceted problem and away from the problem itself; they hope to fool this Court by legal sleight of hand. Diverting attention from real conflicts within the entire set ("scheme to defraud"), the Respondents argue that no conflict is present within a subset of "scheme to defraud"(face-to-face misrepresentation fraud). They then seek to project that lack of conflict on a different facet of "scheme to defraud," that is, omission fraud, and to treat it as if the law in that area were, or should be, identical to face-to-face misrepresentation fraud. Respondents do not, however, examine Petitioners' extensive analysis demonstrating that the two areas are, in fact, properly treated differently by controlling precedent in the other circuits, the states, and this Court, not only under RICO, but other relevant statutes, including

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the deprivation of "honest services." 18 U.S.C. § 1346 (setting aside *McNally v. United States*, 483 U.S.350 (1987)).

antitrust, on which RICO was modeled. Respondents' long, circuit by circuit review of the supposed lack of conflict within the narrow subset of face-to-face representation fraud suffers from this fundamental defect; it would serve little useful purpose for this reply brief to go into Respondents' analyses. Each suffers from the same defect. Petitioners are confident that this Court will be not fooled by Respondents' rhetorical trick.

Under this Court's teaching in *Holmes*, claims for relief under RICO, of course, require a "proximate cause" ("by reason of") relation between their "injury" to "business or property" and the defendant's conduct ("violation"). 18 U.S.C. § 1964(c). But nothing in *Holmes*, contrary to the Fifth Circuit's *Summit* decision, and Respondents' position, says anything about "detrimental reliance" as a *universal* requirement of "proximate cause" for *all* forms of "scheme to defraud." In fact, *Holmes* only dealt with the relation between "near" and "remote" among separate claims for relief. 503 U.S. at 265-68. That aspect of "proximate cause," and only that aspect, was what this Court considered; other aspects of "proximate cause" were neither briefed nor argued, and therefore, were not decided in *Holmes*. As in the case of the Fifth Circuit, Respondents would like to slip from one meaning of "proximate cause" to another meaning of "proximate cause" without this Court's noticing it or any undertaking by them of the necessary treatment of intervening and differing policy concerns.

Accordingly, when Respondents cite face-to-face misrepresentation cases from the various circuits to show that no conflict on detrimental reliance is present, they misstate the relevant precedent, and they seek to confuse

this Court by limiting its focus to a subset of "scheme to defraud" (face-to-face misrepresentation fraud), treating it as if it were the set (all forms of "scheme to defraud"). In fact, the conflict raised by this Petition is, not within the subset, as Respondents would have it, but between the subset and the set,[2] as Petitioner's brief amply demonstrates.[3] That conflict merits this Court's due attention. Respondents' legal sleight of hand ought not work.

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[2] Respondents also seek to minimize the character of the conflict by pointing out that the Fifth Circuit's decision is unpublished, an argument that is easily countered: (1) Petitioners seek to review the rule of law announced in the case; its precedential character is irrelevant on its status as an application of a legal rule. In addition, if handing down an unpublished decision inevitably precluded its review, the lower courts could, by that tactic alone, always circumvent this Court's plenary power of review. The practice of not taking on certiorari unpublished opinions is not a jurisdictional rule, but a practice of prudence. To maintain this Court's ultimate role of superintendence over the entire federal system, this Court *must*, on appropriate occasions, take for review unpublished opinions; this decision is, therefore, an apt decision for review precisely because it is unpublished.

[3] To be sure, this Court denied review of *Summit*, but nothing can be concluded from that denial. The conflict identified in *Summit* (between "proximate cause" in face-to-face and in complex third party frauds) is not identical with this Petition (between "proximate cause" in face-to-face representation and face-to-face omission fraud). The underlying issues, however, are related, and as the *Summit* rule is mindlessly applied across the full landscape of "scheme to defraud," each application beyond its core application to face-to-face representation fraud compounds the original error and demonstrates again conflicts between the circuits. That is the only relevancy of *Summit*.

II. THE ISSUES RAISED ARE BEFORE THE COURT

Respondents ignore those parts of the record that are inconsistent with their effort to narrow the issues before the Court, so as to avoid Petitioners' identification of substantial inter-circuit court conflict. Petitioners were careful to draw to this Court's attention the crucial events that preceded the District Court's dismissal of Petitioners' claims for relief. Petition at p.5 n.9. The District Court specifically referred to its own prior decision involving Petitioners' counsel in cognate litigation. Counsel was, therefore, well-aware of the standards that this judge applied in that litigation and might well apply to Petitioners' claims for relief in this litigation.

Accordingly, each of the issues raised in this Petition was put in question by the course of the litigation that brings this Petition before this Court. No rule of law or prudence necessarily precludes review of what really happened. Petitioners' counsel carefully drafted their claim for relief as a material omission, rather than misrepresentation, precisely to avoid the impact of those unduly circumscribed standards. Respondents are disingenuous now to suggest that this litigation only raises "proximate cause," and not also those other aspects of the litigation that were squarely put in issue by counsel.

Litigation does not take place in a vacuum; Respondents offer no reason in law or policy that establishes that review ought to take place in a vacuum. This Court can hardly consider the issue of "proximate cause" between "violation" and "injury to business or property" within 18 U.S.C. § 1964(c) without taking a fair look at both ends of the equation. How to define "violation" is crucial on

how to define "nexus," as Justice Scalia so well notes in his concurrence in *Holmes* itself. 503 U.S. at 288. Respondents themselves concede that "ordinary prudence" is "just another version of the reliance issue." Brief in Opposition at 29. Accordingly, each of the issues raised by this Petition, which are, in fact, inextricably intertwined, may properly be considered by this Court on review.

CONCLUSION

For the reasons set forth hereinabove, as well as those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

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